

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LATORA DIXON,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security Administration,

Defendant.

No. 07-2122 SC

ORDER DENYING
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
AND GRANTING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before the Court on cross-motions for summary judgment filed by the plaintiff Latora Dixon ("Plaintiff" or "Claimant") and the defendant Michael J. Astrue ("Defendant"). Docket Nos. 7, 11. Plaintiff submitted a Reply. Docket No. 12. Plaintiff seeks review and reversal of the Social Security Commissioner's final decision denying her claim for Supplemental Security Income benefits. For the reasons set forth below, the Court DENIES Plaintiff's Motion for Summary Judgment and GRANTS Defendant's Cross-Motion for Summary Judgment.

II. BACKGROUND

A. Procedural Background

Plaintiff first filed an application for SSI benefits on March 19, 2003, claiming disability with an onset date of March 8, 1998. Administrative Record ("AR") at 114. That application was

1 initially denied, and the denial was upheld on rehearing and on
2 review by the Appeals Council. Id. at 32-35, 40-43, 60-61.

3 Claimant filed a second application for SSI benefits on June
4 21, 2004, which was denied. See id. at 63-67, 71-75, 118-121.
5 Claimant then requested a hearing. The hearing was held before
6 the Administrative Law Judge ("ALJ") on July 11, 2005. Id. at 17.
7 Claimant testified in person at the hearing, as did a vocational
8 expert. Id. Claimant was represented by counsel at the hearing.

9 The ALJ concluded that Claimant is not disabled within the
10 meaning of the Social Security Act, and is therefore not eligible
11 to receive SSI benefits. See id. at 14-25. The Appeals Council
12 denied Claimant's subsequent request for review. Claimant then
13 brought this suit seeking judicial review of that final adverse
14 determination. See Compl., Docket No. 1.

15 **B. Factual Background**

16 Plaintiff was born in May 1983, and is now 25 years old. AR
17 at 18, 114. She has no work experience and a fifth grade
18 education. Id. at 18, 127-131, 135-36. As a basis for her
19 application for benefits, Plaintiff claims she has a learning
20 disability and cannot read or write well, making it impossible for
21 her to perform any job duties. See id. at 132-33.

22 Claimant underwent multiple psychological and neurological
23 examinations, the findings from which were in the record before
24 the ALJ. The first evaluation was conducted by Dr. Sokley Khoi,
25 Ph.D., in June 2003. Id. at 19, 217-20. Dr. Khoi administered
26 several tests, including the Wechsler Adult Intelligence Scale-III
27 (WAIS-III), Wechsler Memory Scale-III (WMS-3), Bender-Gestalt
28

1 Test, and the Rey 15-Item Memory Test-II. Id. at 217. Dr. Khoi
2 concluded that the WAIS-III and Bender-Gestalt Test results were
3 invalid because the Claimant appeared to be malingering:

4 The claimant was noted to engage in many
5 behaviors suggestive of malingering. She made
6 bizarre, careless, and sloppy drawings on the
7 Bender-Gestalt Test, thus this task was
8 discontinued. The claimant was noted to miss
9 obviously correct answers. For example, when
10 asked to count to ten, the claimant stated,
11 "One, two, four, five, seven, eight, ten."
12 However, please note that the claimant was
13 able to correctly identify the numbers on the
14 Digit Symbol-Coding subtest of the WAIS-III.
15 When asked what is the day that comes after
16 Saturday, the claimant stated, "Tuesday."
17 When asked what is the shape of a ball, the
18 claimant stated, "Square." Due to the
19 claimant's poor effort, the following test
20 results are considered invalid.

21 Id. at 218. Dr. Khoi reached the same conclusion with respect to
22 the Rey 15-Item Memory Test-II:

23 Clinical observation and the claimant's
24 pattern of performance on the tests
25 administered suggested inadequate motivation
26 and effort. Therefore, today's test results
27 are considered invalid. The claimant's
28 performance on the Rey 15-Item Memory Test-II
was consistent with malingering. Based on
clinical presentation, the claimant appears to
be functioning within the high borderline to
low average range of intellectual ability. Of
note, the claimant may have cognitive problems
due to limited educational history, but due to
her blatant malingering it is difficult to
accurately ascertain her cognitive
functioning.

29 Id. at 219.

30 In November 2003, Dr. Thomas Hardey, Ph.D., evaluated
31 Claimant and performed a similar battery of tests, adding the
32 Benton Visual Retention Test and Trail Making Test. Id. at 20,
33 226-29. Dr. Hardey reached similar conclusions to Dr. Khoi,

1 finding that none of the test results were valid because Claimant
2 was malingering during every exam. See id. at 228.

3 Results of this evaluation raised questions
4 regarding this applicant's credibility.
5 Clinical observation indicated that this
6 applicant has no functional limitations in
7 daily activities, social functioning, or
8 difficulties with concentration, persistence,
9 or pace. There are no episodes of emotional
10 deterioration in work-like situations. She
11 was observed to have average ability to
12 understand, carry out, and remember simple and
13 complex instructions. She is capable of
14 responding appropriately to coworkers,
15 supervisors, and the public. She can respond
16 appropriately to usual work situations
17 including attendance and safety issues, and is
18 able to deal with changes in a routine work
19 setting. There were no limitations evident
20 due to any emotional impairment. This
21 individual is not considered capable of
22 handling funds in her own best interest, given
23 her poor cooperation with this CE.

24 Id. at 229.

25 Finally, Dr. Laura Catlin, Psy.D., evaluated claimant in
26 October 2004. Id. at 240-246. Dr. Catlin performed the WAIS-III,
27 the Wide Range Achievement Test-3 (WRAT-III), the Rey 15 - Memory
28 Test for Malingering, and the Brief Symptom Inventory (BSI). Id.
at 240. Unlike Dr. Khoi and Dr. Hardey, Dr. Catlin did not
include in her report Claimant's actual performance on the Rey 15
Memory Test, but did indicate that Claimant "was negative for
malingering." Id. at 243. Because Dr. Catlin found no indication
of malingering, she was able to produce valid test results. Dr.
Catlin found that Claimant's Verbal IQ to be 63, her Performance
IQ to be 62, and her Full-Scale IQ to be 59, placing claimant in
the extremely low to borderline range of intellectual functioning.
Id. at 242. According to Dr. Catlin, claimant's WAIS-III and

1 WRAT-III results "indicate a learning disability in Reading,
2 Spelling, and Math." Id. at 243. Dr. Catlin summarized her
3 findings as follows:

4 Ms. Dixon seems to exhibit a profound learning
5 disability and cannot read or write. She only
6 completed school until the sixth grade because
7 of her inability to do the work. Ms. Dixon
8 struggled greatly on all the tests measures
9 and scored far below average on all the
subtests. Her difficulties in school are most
likely the combination of a learning
disability, a low I.Q., an inadequate and
incomplete education, and mental health
difficulties.

10 Id. at 244. Based on the examination, Dr. Catlin diagnosed
11 Claimant with learning disorders and with a major depressive
12 disorder. Id. at 243.

13 14 **III. LEGAL STANDARD**

15 To qualify for disability benefits, a claimant must show that
16 he or she is unable "to engage in any substantial gainful activity
17 by reason of any medically determinable physical or mental
18 impairment which can be expected to result in death or which has
19 lasted or can be expected to last for a continuous period of not
20 less than twelve months" 42 U.S.C. § 423(d)(1)(A). In
21 making this determination, "an ALJ conducts a five step inquiry."
22 Lewis v. Apfel, 236 F.3d 503, 508 (9th Cir. 2001) (citing 20
23 C.F.R. §§ 404.1520 & 416.920).

24 The ALJ first considers whether the claimant
25 is engaged in substantial gainful activity; if
26 not, the ALJ asks in the second step whether
27 the claimant has a severe impairment (i.e.,
one that significantly affects his or her
ability to function); if so, the ALJ asks in
the third step whether the claimant's

condition meets or equals one of those outlined in the Listing of Impairments in Appendix 1 of the Regulations [20 C.F.R. §§ 404.1520(d) & 416.920(d)]; if not, then in the fourth step the ALJ asks whether the claimant can perform in his or her past relevant work; if not, finally, the ALJ in the fifth step asks whether the claimant can perform other jobs that exist in substantial numbers in the national economy. 20 C.F.R. §§ 404.1520(b)-404.1520(f)(1) & 416.920(b)-416.920(f)(1).

Id.

Courts may set aside a decision of the ALJ if it is not supported by substantial evidence. 42 U.S.C. § 405(g); Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001). "Substantial evidence" is the relevant evidence which a reasonable person might accept as adequate to support the ALJ's conclusion. Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). In order to be "substantial," the evidence must amount to "more than a scintilla," but need not rise to the level of a preponderance. Holohan, 246 F.3d at 1201. Where the evidence could reasonably support either affirming or reversing the ALJ's decision, a court may not substitute its judgment for the ALJ's decision. Id.

IV. DISCUSSION

Claimant raises numerous challenges to the ALJ's ruling. First, Claimant asserts that the ALJ improperly rejected Dr. Catlin's conclusions. Second, Claimant asserts that the ALJ's failure to seek the assistance of a medical advisor was a violation of Due Process. Third, Claimant asserts that the ALJ's unfavorable decision is not supported by substantial evidence. Fourth, Claimant asserts that she is entitled to a finding of

1 disability as a matter of law. Finally, Claimant asserts that the
2 ALJ committed legal error by departing from the guidelines in the
3 Dictionary of Occupational titles without adequate justification.
4 The Court addresses each in turn.

5 **A. The Record Provides Specific And Legitimate Reasons For**
6 **Rejecting Dr. Catlin's Opinion**

7 Claimant argues that Dr. Catlin's report contained the only
8 valid test results and that the ALJ had no legitimate basis for
9 rejecting Dr. Catlin's conclusions based on those results.
10 Claimant bases this assertion on the notion that Dr. Catlin's
11 opinion is uncontradicted in the record. "[T]he Commissioner must
12 provide clear and convincing reasons for rejecting the
13 uncontradicted opinion of an examining physician." Lester v.
14 Chater, 81 F.3d 821, 830 (9th Cir. 1995) (as Amended Apr. 19,
15 1996). However, where the examining physician's opinion has been
16 contradicted, the ALJ may reject that opinion for "specific and
17 legitimate reasons that are supported by substantial evidence in
18 the record." Id. at 830-31.

19 Claimant's position is flawed in two ways. First, the
20 premise that Dr. Catlin's opinion is uncontradicted is wrong.
21 While Dr. Khoi and Dr. Hardey concluded that the results of the
22 I.Q. tests they conducted were invalid due to Claimant's
23 malingering, they still reached conclusions about Claimant's
24 behavior and mental capacity based on their interaction with her
25 during clinical examinations. Dr. Khoi concluded that, "Based on
26 clinical presentation, the claimant appears to be functioning
27 within the high borderline to low average range of intellectual
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ability." AR at 219. He also noted that Claimant suffered no impairment to a number of abilities relevant to adequate functioning in the workplace, such as following simple instructions, performing repetitive tasks requiring only one or two steps, and interacting appropriately with coworkers and supervisors. Id. at 219-220. Similarly, Dr. Hardey found that Claimant's "ability to reason or to make occupational or personal judgments was not impaired." Id. at 226. Dr. Hardey also noted that Claimant's "[i]nsight and judgment appeared to be in the normal range" and that her "[f]unctional levels of intellectual and memory ability were in the average range." Id. As noted above, Dr. Hardey questioned Claimant's credibility, but not her ability to "understand, carry out, and remember simple and complex instructions." Id. at 229. While Dr. Catlin's test results may have been the only such results available, it cannot be said that her ultimate conclusions about Claimant's ability to work were uncontradicted.

The second flaw in Claimant's challenge is that it ignores a portion of the ALJ's reasoning. In her brief, Claimant asserts that the ALJ identified only three reasons for rejecting Dr. Catlin's opinion: 1) the lack of detail regarding malingering; 2) that Dr. Catlin has not reviewed the Social Security reports regarding Claimant; and 3) that Dr. Catlin reached her diagnosis of depression based only on the one interview. Mot. at 11. This understates the ALJ's consideration of Dr. Catlin's opinion. The ALJ found that Dr. Catlin's test results were suspect in light of Dr. Khoi's and Dr. Hardey's findings and that, even if valid, the

1 test results did not support Dr. Catlin's diagnosis. AR at 21-22.
2 The ALJ also considered other evidence in the record, such as
3 Claimant never seeking treatment for her purported depression and
4 her independence from others in taking care of her personal needs.
5 Id. at 22. The ALJ also considered his own evaluation of
6 Claimant's credibility when she testified at the hearing. Id. ("I
7 am not persuaded by the claimant's statements regarding her
8 limitations. She has provided inconsistent statements to various
9 providers."). During the hearing, the ALJ stated that he could
10 not properly evaluate Dr. Catlin's conclusions without the
11 underlying data, and Claimant's counsel essentially conceded the
12 point. See id. at 301-02.

13 Dr. Catlin's diagnosis was contradicted by the conclusions of
14 the other physicians who examined Claimant. As such, the ALJ need
15 only provide "specific and legitimate reasons," supported by the
16 record, for rejecting her opinion. The Court finds that the ALJ
17 satisfied this requirement, so the rejection of Dr. Catlin's
18 opinion was proper.

19 **B. The Failure To Seek A Medical Advisor Is Immaterial**

20 Claimant next argues that the ALJ violated Social Security
21 Ruling 96-6p by refusing to consult with a medical advisor. See
22 Mot. at 16-17. When resolving the conflicts between Dr. Catlin's
23 opinion and those of Dr. Khoi and Dr. Hardey, Claimant's attorney
24 suggested that the ALJ might benefit from having an additional
25 expert testify to offer background information about the various
26 tests the examining physicians performed. See AR at 296. The ALJ
27 found that unnecessary. Id. at 296-97. Counsel then suggested
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1 that results from a fourth exam, which were now missing, might be
2 relevant. Id. The ALJ said he could not consider that report
3 because it was not before him. Id. at 19 n.1, 300.

4 Claimant's reliance on SSR 96-6p is misplaced. That Ruling
5 clarifies the circumstances under which the ALJ must seek an
6 updated medical opinion. One condition requiring an updated
7 report is "[w]hen additional medical evidence is received that in
8 the opinion of the administrative law judge or the Appeals Council
9 may change the State agency medical or psychological consultant's
10 finding that the impairment(s) is not equivalent in severity to
11 any impairment in the Listing of Impairments." SSR 96-6p.
12 Nothing in the record suggests that the ALJ here was of the
13 opinion that new medical evidence would change any of the
14 consulting examiners' conclusions. As such, the obligation to
15 seek an updated opinion under this Ruling was never triggered. To
16 the contrary, the ALJ found no need to consult with an additional
17 expert, and was able to interpret Dr. Khoi's and Dr. Hardey's
18 conclusions without assistance. Id. at 297. Claimant also cites
19 Markle v. Barnhart, 324 F.3d 182, 187 (3d Cir. 2003), in which the
20 circuit court held that the ALJ had improperly rejected an
21 examining physician's report. In that case, however, there "was
22 no expert opinion of a psychologist or medical person to
23 contradict" the examining physician's report. Id. As discussed
24 above, the ALJ here had two expert reports from examining
25 physicians contradicting Dr. Catlin's report, so Markle is
26 inapplicable.

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C. The Unfavorable Decision Was Supported By Substantial Evidence

Claimant also asserts that the ALJ's conclusion was not adequately supported by the record, and that Claimant is legally entitled to a finding of disability pursuant to Listing 12.05(B). See Mot. at 15-16, 18. Both of these positions rely on the notion that the ALJ improperly rejected Dr. Catlin's report and relied on his own judgment without support. As discussed above, supra section IV.A, the ALJ properly discounted Dr. Catlin's conclusions based on the record before him, including the reports of Dr. Khoi and Dr. Hardey which contradicted Dr. Catlin's opinion.

Claimant is correct that, where the evidence shows she meets the requirements of Listing 12.05, her claim must be granted. This is elementary at most, however, since comparison between the Claimant's alleged impairments and the Listing is one part of the ALJ's five-part inquiry. See Lewis, 236 F.3d at 508; AR at 18 (citing 20 C.F.R. § 416.920(a)). The evidence here does not show that she meets Listing 12.05. Contrary to Claimant's assertion, the record is replete with evidence a reasonable person might find adequate to support the ALJ's ruling that Claimant did not meet the requirements of the Listing. See Reddick, 157 F.3d at 720.

Claimant also argues that the Court should consider a follow-up report prepared by Dr. Catlin after the ALJ's decision. See Mot. at 12-13; Reply at 4-6. The second report was apparently intended to address the ALJ's concerns and reasons for rejecting her original opinion. The additional evidence includes raw data from the tests Dr. Catlin performed, including the Rey 15 - Memory

Test for Malingering, as well as other details of her original examination of Claimant and a subsequent reevaluation. See AR at 288-89. The parties dispute whether or not the Court should consider this evidence.¹ The Court need not reach that question, however, as the supplemental report would not change the outcome. At most, the supplemental report strengthens Claimant's position. It does nothing to diminish the substantial evidence in the record supporting the ALJ's decision. The two expert opinions contradicting Dr. Catlin's report remain on the record, as do the ALJ's credibility determinations and various other evidentiary failings in Claimant's case. On such a record, the Court cannot reverse the ALJ's decision. See Holohan, 246 F.3d at 1202.

D. The Vocational Expert's Testimony Did Not Conflict With the Dictionary of Occupational Titles

Claimant's remaining argument is that the ALJ committed error by not inquiring about reasons for the inconsistencies between the vocational expert's ("VE") testimony and the Dictionary of Occupational Titles ("DOT"). See Mot. at 6-9. "When there is an apparent unresolved conflict between VE or VS [vocational specialist] evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about

¹Defendant argues that under 42 U.S.C. § 405(g), Claimant must show that the evidence is material and that Claimant had good cause for failing to present the evidence earlier. Claimant argues that the evidence was offered to the Appeals Council, which should have reviewed it under 20 C.F.R. §404.970(b) because it "relates to the period on or before the date of the administrative law judge hearing decision," and that judicial review encompasses the complete record before the Appeals Council.

1 whether the claimant is disabled." SSR 00-4p. In such a
2 situation, the ALJ has an affirmative obligation to inquire about
3 the inconsistency on the record. See id.; see also Massachi v.
4 Astrue, 486 F.3d 1149, 1152 (9th Cir. 2007) (ALJ may not "rely on
5 a vocational expert's testimony regarding the requirements of a
6 particular job without first inquiring whether the testimony
7 conflicts with the [DOT]").

8 Claimant argues that the VE's testimony here conflicted with
9 the DOT and that the ALJ expressly refused to inquire about this
10 issue on the record. Claimant is wrong on both counts. First,
11 the VE's testimony did not conflict with the DOT. Upon questions
12 from both Claimant's counsel and the ALJ, the VE stated that his
13 opinion about certain jobs was different from the DOT, but not
14 inconsistent with it. See AR at 341-43. The VE identified two
15 jobs that he thought Claimant would be able to perform, both of
16 which have a Language Development skill level of 1 in the DOT.
17 Id. at 334-39. The "reading" aspect of Language Development level
18 1 in the DOT is described as follows: "Recognize the meaning of
19 2,500 (two- or three-syllable) words. Read a rate of 95-120 words
20 per minute. Compare similarities and differences between words
21 and between series of numbers." Clark Decl., Docket No. 8, Ex. 1.
22 It is not disputed that Claimant is illiterate and does not meet
23 this standard. However, the DOT is not necessarily an absolute
24 description of the requirements for a particular job:

25 The DOT lists maximum requirements of
26 occupations as generally performed, not the
27 range of requirements of a particular job as
28 it is performed in specific settings. A VE,
 VS, or other reliable source of occupational

1 information may be able to provide more
2 specific information about jobs or occupations
than the DOT.

3 SSR 00-4p. Thus, the VE may conclude that Claimant, or someone
4 with her skills, could perform a specific job, even if the
5 description of that job in the DOT requires a higher level for
6 Language Development. Such differentiation is contemplated in the
7 Ruling and would not amount to an unresolved conflict. Here, the
8 VE acknowledged that Claimant was illiterate, but said that her
9 reading abilities were immaterial to the jobs in question. See AR
10 at 334-35, 338, 341. Given that the VE was providing the exact
11 sort of "more specific information" about the jobs in question,
12 there was no conflict that required resolution on the record, so
13 the ALJ did not err.

14 Even if the VE's testimony amounted to a conflict, however,
15 the Court would still reject Claimant's position. Both Claimant's
16 counsel and the ALJ questioned the VE about his opinion and about
17 the DOT. See generally id. at 334-348. The VE explicitly
18 acknowledged the definition of Language Development 1,
19 acknowledged that the jobs in question were listed in the DOT as
20 requiring Language Development 1, and conceded that Claimant did
21 not meet that requirement, but stated that he thought Claimant
22 could still perform those jobs. To the extent there is a conflict
23 between the VE's testimony and the DOT, that conflict is
24 adequately explained in the record. The Court agrees with
25 Defendant that, if there was in fact a violation of SSR 00-4p, it
26 was a harmless error at most.

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